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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

FREDERICK WALKER SMITH,

Defendant and Appellant.

D039205, D039206

(Super. Ct. No. SCD156697,  
SCD158532)

CONSOLIDATED APPEALS from judgments of the Superior Court of San Diego County, Norbert Ehrenfreund, Judge (retired judge of the San Diego Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution) and Rafael A. Arreola, Judge. Affirmed in part, reversed in part and remanded for resentencing.

Frederick Walker Smith appeals judgments entered after a jury convicted him of the sale of cocaine base and possession for sale of cocaine base and a separate jury convicted him of selling methamphetamine and a substance in lieu of illegal drugs. He contends (1) the court erred in instructing the jurors with CALJIC No. 17.41.1; (2) the

court erred in denying his motion to withdraw his request for self-representation and in denying his request for a public defender to represent him; (3) the matter should be remanded for resentencing to allow the court to impose an authorized sentence with respect to the prison prior alleged under Penal Code section 667.5, subdivision (b) (all further statutory references are to the Penal Code unless otherwise specified); and (4) the abstract of judgment must be corrected to delete references to enhancements stricken by the court under section 1385. We affirm the judgments, but remand the matter for resentencing in accordance with this opinion.

#### FACTUAL AND PROCEDURAL BACKGROUND

In November 2000, Smith was arrested for selling to an undercover police officer a substance in lieu of a controlled narcotic (count 1B) and selling methamphetamine (count 2B; Case No. SCD156697). In February 2001, Smith was again arrested after selling cocaine base to an undercover police officer and charged with selling cocaine base (count 1A) and possession for sale of cocaine base (count 2A; Case No. SCD158532).

With respect to count 1B, the district attorney alleged that Smith had a prior conviction for the transportation or sale of a controlled substance, making him ineligible for probation. With respect to count 2B and counts 1A and 2A, the district attorney alleged Smith had two prior drug convictions for selling cocaine base and possession for sale of cocaine base, making him ineligible for probation and resulting in sentencing enhancements. Both cases alleged one prison prior. Counts 1A and 2A also alleged that Smith committed the offenses while on bail in another pending felony case (SCD156697).

The cases proceeded to trial and separate juries found Smith guilty on all counts. The cases were then consolidated for purposes of a court trial on the prior conviction allegations and for sentencing. On the date set for trial of the priors and for sentencing, Smith moved to dismiss his attorney and to represent himself. The trial court granted the motion and trailed the matter for about six weeks.

When the matter again came before the court for trial, Smith asked to have a public defender appointed to represent him. After the trial court denied his request, it made true findings on the prior conviction and prison prior allegations, with Smith having previously admitted the bail enhancement allegation. The court continued the sentencing hearing because Smith was pending trial in a third case for possession for sale of a controlled substance and the trial court also had not received a copy of the probation report.

While trial on the third case against Smith was still pending, the court sentenced Smith to a total of 11 years in state prison, as follows: five years on count 1A; three years consecutive for the prior conviction enhancement; two years on the bail enhancement; one year consecutive for count 2B; and stayed sentence on counts 2A and 1B under section 654. The court struck the other prior conviction enhancement and gave Smith a total of 235 days of custody credits. Smith filed separate appeals, which we consolidated.

## DISCUSSION

### *Giving CALJIC No. 17.41.1 Was Not Prejudicial*

Smith contends the trial court committed prejudicial error by instructing the jurors with CALJIC No. 17.41.1, which created a duty to report juror misconduct, such as refusal

to deliberate or intentional disregard of the law. Smith argues that the instruction invaded the privacy of the jury, was coercive, violated his right to juror unanimity and inhibited the jury's power of nullification. After Smith filed his opening brief, the California Supreme Court resolved the constitutionality of CALJIC No. 17.41.1 in *People v. Engelman* (2002) 28 Cal.4th 436. The court held the instruction "does not infringe upon defendant's federal or state constitutional right to trial by jury or his state constitutional right to a unanimous verdict," but it directed that the instruction no longer be used because it posed an unnecessary risk to "the proper functioning" of jury deliberations. (*Id.* at pp. 439-440, 445.)

For the reasons stated in *Engelman*, we reject Smith's argument. Moreover, Smith admits that the record in both cases does not affirmatively show any juror felt intimidated or coerced. Accordingly, he did not meet his burden of showing prejudice through the giving of this instruction.

*The Trial Court Did Not Err in Denying Smith's Request to  
Withdraw his Motion for Self-Representation*

A defendant has the right to conduct his or her own defense, providing he or she knowingly and intelligently waives the right to counsel. (*Faretta v. California* (1975) 422 U.S. 806, 835-836.) After a defendant waives the right to counsel, the decision to then reappoint counsel rests within the sound discretion of the trial court. (*People v. Gallego* (1990) 52 Cal.3d 115, 163-164 (*Gallego*).) In exercising its discretion the court must consider the totality of the facts and circumstances. (*Id.* at p. 164, quoting *People v. Smith* (1980) 109 Cal.App.3d 476, 484.) Relevant factors include the defendant's prior

history of substituting counsel, the stated reasons for the request to return to representation by counsel, the length and stage of the trial proceedings, the disruption or delay that reasonably might be expected to ensue from granting the motion, and the likelihood of defendant's effectiveness in defending against the charges if required to continue to act as his own attorney. (*Gallego, supra*, 52 Cal.3d at p. 164.) Reversal for an abuse of discretion is not warranted unless it is reasonably probable that a result more favorable to the defendant would have been reached in the absence of such error. (*People v. Elliott* (1977) 70 Cal.App.3d 984, 998.)

Here, Smith does not challenge the validity of his *Faretta* waiver and the record reflects that the trial court explained the disadvantages of the request and Smith knew the sentence he faced if the priors were found true. After the trial court found the waiver was knowing and intelligent, it continued the matter for about six weeks to allow Smith time to prepare, but cautioned him that there would be no more continuances.

On the date set for trial of the priors and for sentencing, Smith indicated that he did not have a copy of the information, did not understand what was "going on" and wanted an attorney. After explaining to Smith that he could not go "back and forth" as to wanting an attorney, the court provided him with a copy of the information and proceeded to make a true finding as to all the alleged priors. The court then continued the sentencing hearing to allow Smith time to review the probation reports. About seven weeks after trial on the priors the court sentenced Smith, who never renewed his request for counsel.

Smith now claims the trial court abused its discretion in denying his request to withdraw his *Faretta* motion. We disagree. Although the trial court did not expressly analyze the factors set forth in *Gallego*, the record reveals that the prosecution explained to Smith the sentence he faced if the priors were found to be true and that the trial court impressed on him the need to be ready to represent himself because no further continuances would be granted. Despite this knowledge, six weeks to prepare, and another explanation by the prosecution of what it sought to prove, Smith requested the appointment of counsel. Smith provided no explanation for his request other than the fact he did not understand what was going on and felt the priors were nothing he could really fight.

The trial court did not err by holding Smith to his waiver. A defendant does not have the right to have his case presented by counsel and by himself alternately as his pleasure dictates. (*People v. Mattson* (1959) 51 Cal.2d 777, 789, disagreed with on another ground in *People v. Crandell* (1988) 46 Cal.3d 833, 861-862, abrogated on another ground in *People v. Crayton* (2002) 28 Cal.4th, 346, 364-365.) Smith was afforded ample time to prepare to represent himself for trial of the priors or to request appointment of counsel, but he apparently chose not to do so. At the time of the waiver the prosecution explained the sentence Smith faced if the court found the prior allegations to be true and when trial on the priors commenced, he received a second explanation of what would be occurring. It was not unreasonable for the trial court to conclude that Smith's claimed ignorance was disingenuous and that his request for counsel was intended to disrupt the proceedings and frustrate the orderly administration of justice. Smith's later actions support this conclusion. After trial of the priors, the trial court

continued the sentencing, but Smith never renewed his request for counsel. In fact, after sentencing, Smith reaffirmed his desire to represent himself on appeal. Under these facts and circumstances we cannot conclude that the trial court abused its discretion in denying Smith's request to withdraw his motion for self-representation.

*Resentencing and Correcting Abstract of Judgment Is Required*

Smith argues, and the Attorney General concedes, that this matter must be remanded for resentencing. Although the trial judge found the prison prior allegation true, the sentencing judge failed to include the prison prior during sentencing. In contrast, the sentencing minutes and the abstract of judgment indicate the court stayed two prison priors. "The transcript prevails over the abstract regarding the substance of the judgment." (*People v. Eberhardt* (1986) 186 Cal.App.3d 1112, 1116, fn. 6, citing *People v. Blackman* (1963) 223 Cal.App.2d 303, 307-308.) Because the sentencing court never mentioned the prison prior, the matter must be remanded for the court to either stay or impose sentence on the prison prior.

Smith also contends the abstract of judgment improperly reflects two stayed enhancements in Case No. SCD158532, when the enhancements were actually stricken by the trial court under section 1385, subdivision (a). After reviewing the sentencing transcript, the abstract of judgment and the trial court's ex parte minute order amending its sentencing minutes, we disagree. But, we find a discrepancy between the sentencing transcript and the abstract of judgment as to Case No. SCD158532 that requires correction.

At the sentencing hearing, the trial court first addressed Case No. SCD158532, listed as the "A" case in the abstract of judgment. The court imposed one Health and Safety Code section 11370.2, subdivision (a) enhancement and dismissed the other. Ex parte minutes prepared after the sentencing hearing specify that the enhancement applied to count 1A; however, the ex parte minutes and the abstract incorrectly state that the court "stayed" the Health and Safety Code section 11370.2 enhancement as to count 2A. The abstract must be corrected to indicate the Health and Safety Code section 11370.2 enhancement as to count 2A was stricken to conform to the court's oral pronouncement.

The court also imposed a two-year bail enhancement, but it failed to specify whether the enhancement applied to count 1A or count 2A. The ex parte minutes corrected this oversight by specifying the enhancement applied to count 1A and was stayed as to count 2A. Therefore, the abstract is correct as to the bail enhancement.

The court then addressed Case No. SCD156697, listed as the "B" case in the abstract of judgment. The court orally dismissed the Health and Safety Code section 11370.2 "allegation." The ex parte minutes confirm that the court intended to strike the Health and Safety Code section 11370.2 enhancement as to both counts 1B and 2B, although the minutes fail to specify that the enhancements were stricken in Case No. SCD156697. The abstract correctly omits these enhancements stricken under section 1385.

#### DISPOSITION

This matter is remanded for the trial court to either stay or impose sentence on the prison prior. As to Case No. SCD158532, the abstract of judgment must be corrected to



indicate the Health and Safety Code section 11370.2 enhancement was stricken as to count 2A. After these proceedings, the trial court is directed to prepare an amended abstract of judgment and to forward a copy of the amended abstract of judgment to the Department of Corrections. In all other respects, the judgment is affirmed.

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McINTYRE, J.

WE CONCUR:

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HUFFMAN, Acting P. J.

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O'ROURKE, J.